Privy Council Appeal No. 16 of 1987

Chan Man-Sin *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH NOVEMBER 1987

Present at the Hearing:

LORD BRANDON OF OAKBROOK
LORD ACKNER
LORD OLIVER OF AYLMERTON
SIR JOHN STEPHENSON
SIR EDWARD EVELEIGH

[Delivered by ***Lord Oliver of Aylmerton****]*

This is an appeal with special leave from a judgment of the Court of Appeal of Hong Kong given on 30th May 1986. The appellant was at all material times an accountant for two companies, Hunter Corporation Limited ("Hunter") and Merit Investment Company Incorporated ("Merit") which maintained bank accounts in Hong Kong with the Standard Chartered Bank ("the Bank"). Between 26th July 1983 and 7th October 1983, by means of five forged cheques drawn on Merit's account, he withdrew sums totalling HK$2,750,647 and caused them to be deposited in his personal account with the Overseas Trust Bank. As a result, Merit's account became overdrawn but it had arranged a facility with the Bank up to HK$3,000,000 and this limit was not exceeded. Between 31st December 1983 and 30th March 1984, by means of five further forged cheques, the appellant withdrew from Hunter's account sums totalling HK$2,022,392.30 which he caused to be deposited to the credit of the account of a business of which he was the sole proprietor. Hunter had likewise arranged a facility with the Bank up to a limit of HK$4,000,000 and these withdrawals, although the account was overdrawn, did not cause the limit to be exceeded. Between 11th April 1984 and 12th May 1984 the appellant, again by

the use of forged cheques, caused five further sums amounting in all to HK$2,690,608 to be withdrawn from Hunter's account. This time, however, the authorised overdraft limit of HK$4,000,000 was exceeded on each occasion.

The appellant's defalcations came to light in July 1984 and he was duly charged in the District Court of Hong Kong at Victoria with five charges of theft of choses in action, namely debts owed by the Bank to Merit (charges 1 to 5) and ten charges of theft of choses in action, namely debts owed by the Bank to Hunter, charges 11 to 15 being those relating to the last-mentioned series of forgeries. On 9th December 1985 he was convicted of charges 1 to 10 and sentenced to imprisonment for three years concurrent in respect of each conviction. He was acquitted of charges 11 to 15 on the technical ground that, since there was in respect of the sums the subject-matter of those charges neither a debt due from the Bank to Hunter nor any subsisting arrangement under which Hunter was entitled to draw from the Bank, there was no chose in action of Hunter capable of being stolen. The appellant sought leave to appeal from the Court of Appeal of Hong Kong against his convictions but that application was dismissed on 30th May 1986. On 5th November 1986 special leave was granted by Order in Council to appeal to their Lordships' Board against the judgment of the Court of Appeal.

The argument for the appellant is a simple one and is founded upon the proposition that a bank is not entitled in law, as against its customer, to debit the customer's account with the amount of any cheque which the bank has not, in fact, any authority from the customer to honour. Thus, it is said, if the bank honours a forged cheque and debits the customer's account accordingly, the transaction is, quite simply, a nullity as a matter of law so far as the customer is concerned and the customer, on discovering the unauthorised debit to his account, is entitled to insist upon its being reversed. For this proposition reliance is, quite rightly, placed upon the decision of their Lordships' Board in *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.* [1986] A.C. 80. Starting out from this foundation, the appellant argues that the presentation of the ten forged cheques in respect of which the appellant was convicted produced, as a matter of legal reality, no diminution at all of the respective credit balances of the companies. The Bank simply made unauthorised debits to their accounts which they were entitled to have reversed upon demand. Thus, it is argued, although the appellant was no doubt guilty of offences of forgery and obtaining a pecuniary advantage by deception with which he was not charged, he could not have been guilty of the offences with

which he was charged, namely, theft of Merit's or Hunter's choses in action.

The Theft Ordinance of Hong Kong [1980 Ed.] (Cap. 210) follows, in all respects material to the instant case, the provisions of the English Theft Act 1968 ("the Act of 1968"). Section 2 provides that "A person commits theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it"; and section 5 includes "... things in action and other intangible property" within the statutory definition of "property". It is not disputed that the debt due to the customer from his banker is a chose in action capable of being stolen and this equally applies to the sum which a customer is entitled to overdraw under contractual arrangements which he has made with the bank (see *R. v. Kohn* [1979] 69 Cr.App.R. 395), though strictly in the latter case the chose in action is the benefit of the contractual arrangement with the bank. What is argued, however, is that, since as between the customer and the bank an unauthorised debit entry in the customer's account is a mere nullity, the customer is deprived of nothing and therefore there has been no appropriation. Equally, it is said that, since the customer whose property is alleged to have been stolen has not in fact been deprived of anything, there cannot have been an intention permanently to deprive him of the property. Thus, it is argued, there were lacking two essential ingredients of the offences with which the appellant was charged and he was entitled to an acquittal.

Their Lordships can deal very briefly with the second submission. The appellant did not elect to give evidence and if there was, as the prosecution contended, an appropriation of the companies' property, there was ample evidence from which the intention permanently to deprive them of it could be inferred. Even if it were possible to infer or assume that the appellant contemplated that the fraud would be discovered and appreciated also that his employers would or might challenge the Bank's entitlement to payment of the sums debited, he would fall within the provisions of section 7 of the Ordinance. That section provides:-

> "(1) A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other's rights ..."

Quite clearly here the appellant was purporting to deal with the companies' property without regard to their rights.

Reverting to the appellant's principal ground of appeal, this has an appealing simplicity. The appellant's difficulty, however, is that it entirely ignores the artificial definition of appropriation which is contained in section 4(1) of the Ordinance and reproduces section 3(1) of the Act of 1968. It is in the following terms:-

> "(1) Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner."

The owner of the chose in action consisting of a credit with his bank or a contractual right to draw on an account has, clearly, the right as owner to draw by means of a properly completed negotiable instrument or order to pay and it is, in their Lordships' view, beyond argument that one who draws, presents and negotiates a cheque on a particular bank account is assuming the rights of the owner of the credit in the account or (as the case may be) of the pre-negotiated right to draw on the account up to the agreed figure. Ownership, of course, consists of a bundle of rights and it may well be that there are other rights which an owner could exert over the chose in action in question which are not trespassed upon by the particular dealing which the thief chooses to assume. In *R. v. Morris* [1984] A.C. 320, however, the House of Lords decisively rejected a submission that it was necessary, in order to constitute an appropriation as defined by section 3(1) of the Act of 1968, to demonstrate an assumption by the accused of all the rights of an owner.

Their Lordships are, accordingly, entirely satisfied that the transactions initiated and carried through by the appellant constituted an assumption of the rights of the owner and, consequently, an appropriation. It is unnecessary, for present purposes, to determine whether that occurred on presentation of the forged cheques or when the transactions were completed by the making of consequential entries in the bank accounts of the companies and the appellant or his business respectively. It is, in their Lordships' view, entirely immaterial that the end result of the transaction may be a legal nullity for it is not possible to read into section 4(1) of the Ordinance any requirement that the assumption of rights there envisaged should have a legally efficacious result.

Their Lordships are fortified in the view which they have formed by the recent decision of the English Court of Appeal (Criminal Division) in *R. v. Wille* decided on 26th January 1987 of which they have been provided with a transcript and in which the Court reached the same conclusion in circumstances not materially dissimilar to those in the instant case. It seems probable that if that decision had been delivered at the time when special leave was applied for it would not have been granted. Their Lordships will accordingly humbly advise Her Majesty that the appeal should be dismissed.